IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 16230

UNITED STATES OF AMERICA, *Plaintiff-Appellant*

v.

LOBUE BROS., ET AL., *Defendants-Appellees*

On Appeal From the United States District Court for the Southern District of California

BRIEF FOR SUNKIST GROWERS, INC., AMICUS CURIAE

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PRELIMINARY STATEMENT

This brief is filed pursuant to paragraph 9(a) of Rule 18, by Sunkist Growers, Inc. (hereinafter referred to as "Sunkist"), a cooperative marketing association engaged in marketing citrus fruits grown in California and Arizona. Sunkist conducted such marketing operations in 1956 on behalf of some 12,000 growers who marketed their fruits through some 140 local associations. Of these local associations, which were affiliated with Sunkist, 92 packed and shipped naval oranges in the 1955-56 season. Each such local was a "handler" of navel oranges and each was subject to the same regulations and requirements under the

terms of the marketing order as were applicable to LoBue Bros. against whom this proceeding was instituted for violation of the marketing order by reason of shipments in excess of the quota or allotment established for that shipper for the two weeks beginning April 1 and 8, 1956.

This brief is submitted in support of the Government position that defendants violated the order and that the statutory sanction for such violation should be imposed. To avoid undue repetition this brief will adopt the statement of facts, the specification of errors and the argument in the brief presented by the United States. It will be the purpose of this brief to point out that Congress intended that there be an effective means of enforcement to preserve the benefits marketing orders provide for growers and that the severity of the sanction is appropriate to the gravity of the offense. Such discussion will include a brief review of the statute, a consideration of the regulatory provisions of the particular Marketing Order here involved and the effects upon other handlers in the industry, as well as upon navel growers generally, of non-compliance on the part of any one handler, such as the defendants herein. Finally, it was not contemplated nor should it be permitted that a handler escape the consequences of violation of the Order by any procedural maneuver such as was resorted to in this case.

THE STATUTE

The Agricultural Marketing Agreement Act of 1937 (50 Stat. 246; 7 USC 601ff) was a reenactment and amendment of certain provisions of Title 1 of the Agricultural Adjustment Act (1933) (48 Stat. 31) as same had been amended by the Act of August 24, 1935 (49 Stat. 750). The legislative action in 1937 was prompted by the fact that certain provisions of the Agricultural Adjustment Act (not relating to marketing agreements) had been held invalid. *United States* v. *Butler,* 297 U.S. 1.

Such statute, with subsequent amendments, provides for the issuance of marketing orders with respect to specified commodities (including navel oranges) under which several types of volume or quality regulation (or both) may be imposed with the general objective of improving grower returns, subject to the limitation that certain regulations must be discontinued when prices exceed parity. The act constitutes an exercise of the Congressional power to regulate commerce (See Sections 1 and 2; 7 USC 601, 602) and has been upheld as a valid exercise of that power. *United States* v. *Rock Royal Cooperative*, 307 US 533, 568-71; *United States* v. *Wrightwood Dairy Co.*, 315 US 110, 119-126. The conclusions announced by the Supreme Court in the two cases just cited had been reached at an earlier date by this Court in *Edwards* v. *United States*, 91 Fed. 2nd, 767, 777-78, 782-783.

Of the several types of regulation authorized by the act, that employed in the marketing order here under consideration was a limitation of shipments by weekly periods. In this manner supplies offered for sale were matched with the demand. Those engaged in the production and marketing of perishable commodities had become aware of the improvement in income or returns to the growers that resulted when supplies were reduced by natural causes such as a freeze or drought. It had been observed that the shorter crop, commanding a higher unit market price, yielded a greater return to the growers than excessive supplies which had to be sold for lower unit prices. The limitation of shipments authorized by the Marketing Agreements Act is a statutory tailoring of supplies to demand in a manner that will equitably distribute the burden of elimination among all handlers and their respective growers.

Commenting on the original marketing order provisions of the Agricultural Adjustment Act shortly after the first year's experience under that statute, H. R. Wellman, now

Vice President of the University of California at Berkeley, California, said in an address at the 25th Annual Meeting of the American Farm Economic Association on December 28, 1934:

> "Restoration of the purchasing power of producers of fruits and vegetables through the establishment and maintenance of the balance between the supplies and consumption of these products is sought to be achieved under the agricultural adjustment act by means of marketing agreements. * * *
>
> * * * * * * * * *
>
> "Limitation of the total volume marketed during the entire season is based on the expectation that the total return to growers will be larger for the limited volume than would be the case if all of the available supply were marketed. Under conditions of inelastic consumer demand or of high marketing charges limitation of the total supply marketed during years of large crops relative to consumers' incomes is an effective means of increasing growers' returns." (Journal of Farm Economics, Vol. XVII, pp. 349, 351).

This Court in its decision of July 22, 1937, considering an earlier marketing order on oranges, commented as follows:

> "The regulated flow to market of oranges, in accordance with the provisions of the Act as applied by the order, tends to (1) a reasonably constant, dependable supply at the terminal markets by the avoidance of alternate gluts and famines, (2) a ready disposition of the fruit at terminal markets without expense and deterioration consequent upon holding, (3) a more accurate anticipation by railroads of the probable transportation requirements of the citrus industry, and (4) a more efficient conduct of railroad operations respecting the availability and flow of refrigerator cars, thereby promoting the confidence of dealers, increased market stabilization, higher standards of trade, protection to growers, handlers and consumers, and increased consumptive demand

> respecting such fruit." *Edwards* v. *United States*, 91 Fed. 2nd 767, 777.

In the same decision, at page 776, this Court commented in some detail upon the importance of the citrus industry.

Three methods of enforcement of marketing orders are provided by the statute:

(1) Forfeiture of three times the value of the excess over any quota or allotment, (Sec. 8a(5); 7 USC 608a (5));

(2) Injunction in a suit brought by the United States District Attorney, at the request of the Department of Agriculture, (Sec. 8a(6) and (7); 7 USC 608a(6) and (7));

(3) Criminal prosecution (Sec. 8c(14); 7 USC 608c(14)).

With respect to the third method above listed, a proviso in Sec. 8c(14) forbade imposition of a penalty "under this subsection" for violation by a handler who had filed a petition with the Secretary of Agriculture for modification of or exemption from the order, pursuant to Sec. 8c (15) A of the Act.

The method of enforcement here employed was the first above listed. Section 8a which authorized both the first and second methods of enforcement contained the additional provision:

> "The remedies provided for in this section shall be in addition to, and not exclusive of, any of the remedies or penalties provided for elsewhere in this title or now or hereafter existing at law or in equity." (Sec. 8a(8)).

THE MARKETING ORDER

The particular marketing order here involved is Marketing Order No. 14, as amended, regulating the handling of navel oranges grown in Arizona and designated part of

California, (hereinafter referred to as the "navel orange order", or "the order", effective September 22, 1953 and in effect since that date. (R. 20; 7 CFR 914). Such order was the latest of a series of marketing orders which had been in effect during most of the time since the original enactment of the Agricultural Adjustment Act of 1933. The order provided for the limitation of the quantity of oranges which may be handled during a specified week (Sec. 914.52). Provision was made for the establishment of a prorate base for each person who had oranges available for current shipment (Sec. 914.53). The allotment to each such person represented such person's share of the total weekly shipments authorized and was computed by multiplying the authorized weekly shipment by the prorate base, the latter expressed in terms of a percentage. (Sec. 914.54).

The promulgation of the navel orange order was accompanied by a decision issued by the Secretary of Agriculture (18 FR 4708). The Order was amended effective August 1, 1954, and the decision with respect to such amendments was published in 19 FR 2941. The order as thus amended was in effect at the time the excess shipments were made by LoBue Bros. in April, 1956.

The findings and conclusions set forth in the Secretary's decision portray the purposes and objectives of the order and demonstrate the importance of the order to the citrus industry. The following quotations are particularly pertinent to the situation presented in the present case:

> "During the California-Arizona navel orange shipping season, there are sharp fluctuations in the demand for such oranges. These oranges have been associated with the Christmas holiday season and, prior to Christmas there is a sharp increase in consumer demand for such oranges. Following Christmas, this demand drops rapidly and thereafter increases gradually until the end of the shipping season. From week to week, however, changes in prices received and quantities sold reveal fluctuations in demand caused by the factors

affecting the level of demand for California-Arizona navel oranges.

"The primary problem to which the proposed marketing agreement and order is addressed is that of correlating the quantity of oranges to be shipped each week with the changes in demand for such oranges. The question is whether the weekly shipments can be adjusted to changes in demand conditions more effectively when they are regulated by means of a marketing agreement and order program than when they are not so regulated. The marketing agreement and order is not proposed as a device to be used primarily for the purpose of reducing the total quantity of oranges shipped to fresh markets, except as a result of limitations of sizes so shipped. Rather, it is proposed as a device for adjusting the rate of shipping the available supplies so as to coordinate the flow of shipments with the market demands for such oranges, and thus to tend to achieve the declared policy of the act.

"Oranges may be stored on the tree after reaching maturity. When the crop of oranges in a particular producing district has reached maturity, all the fruit is capable of being shipped. Producers, moreover, are anxious to harvest their fruit in order to avoid possible loss from frost or from drop or deterioration in grade. As a consequence, producers exert strong pressures upon handlers to ship their fruit. It is extremely difficult for operators of packinghouses to ignore such pressures and to ship such oranges in response to the then current demand.

"The authority to regulate shipments each week under a marketing program provides a means to withstand such pressures to ship and thereby to adjust the quantity of fruit shipped to that required in marketing channels. In addition, the proposed marketing agreement and order makes readily available to handlers knowledge of the quantity which is to be shipped each week, as well as more accurate knowledge of the quantity of fruit available in and enroute to consumer markets. Moreover,

receivers of California-Arizona navel oranges would be provided with a basis for maintaining their commercial operations in the light of information with respect to the rate at which supplies will be made available to them.

"Such conditions do not exist in the absence of a marketing agreement and order, and the evidence indicates that there exists a tendency on the part of handlers, in the absence of some program providing restraint of shipments, to ship excessive quantities because of desires of producers to pick their fruit and thereby avoid losses through damage or deterioration in the groves. Moreover no individual handler or group of handlers successfully can increase the level of prices by reducing shipments because other handlers can nullify such action by increasing their shipments accordingly.

"Therefore, it is concluded that a marketing agreement and order is needed to effectuate the declared policy of the act by establishing orderly marketing conditions for navel oranges grown in the production area through providing a means of limiting the quantity of such oranges that may be shipped each week to commercial fresh channels." (18 FR 4708, 4710).

Under the navel order the area of production was divided into four prorate districts; the shipments here involved were from prorate district No. 1, commonly referred to as Central California. (R 20-21; 80-81). The pressures upon handlers to ship fruit were particularly acute in Central California in April as that was approaching the end of the shipping season for that area. (R 106, 141, 147-148, 161-164). Obviously the same pressures were being felt by all other handlers operating in the Central California area.

With respect to the order provisions relating to allotments and the preservation of equities among handlers, the Secretary's decision made the following findings:

"The Act requires, in effect, that a program of this nature should provide a method for allotting the total

quantity of the regulated commodity which may be handled during a specified period so that such quantity may be equitably apportioned among all of the handlers thereof. Under the provisions of the proposed marketing agreement and order, this requirement means that each handler should be given the same opportunity to market oranges under volume regulation as each other handler in the same prorate district. The equality of opportunity to market oranges should exist among handlers within a particular prorate district, because the market opportunities vary as between prorate districts as the result of the different timing of maturity and shipping life of the oranges in each prorate district.

"The act also requires that such equitable apportionment should be on the basis of the quantity of the regulated commodity which each handler has available for current shipment, or upon the quantity of such commodity shipped by each such handler in such prior period as the Secretary determines to be representative, or both. Under this program, an individual handler's equity or share of the limited quantity which may be shipped from a particular prorate district in any week should be based upon the quantity of oranges currently controlled by such handler. Testimony at the hearing indicated that the percentage of the oranges controlled and handled varies between handlers from year to year. Therefore, the determination of an individual handler's share on the basis of past performance, or a combination of past performance and current control, would not truly reflect the current status of each handler in relation to all others. Furthermore, the use of the quantity of oranges currently under control as a basis for determining individual handler's equities is practical under this program as it is possible to determine with precision the quantity of oranges currently controlled by each handler.

"The equity of each handler in the total quantity which may be handled in a prorate district during any week should be expressed as his prorate base. A prorate base is the ratio between the total quantity or oranges available for current shipment of the

> particular handler and the total quantity of oranges available for current shipment of all such handlers in the particular prorate district. Thus each handler's share of the limited quantity which may be shipped from a given prorate district each week under volume regulation is the same percentage as his share of the total quantity of oranges available for current shipment in such prorate district." (18 FR 4708, 4715)

Fresh shipments of California-Arizona navel oranges in the 1955-56 crop year (November 1-October 31) were 27 million cartons; this was substantially the same as the annual volume of the preceding two years—25 million in 1953-54 and 26.4 million in 1955-56. (USDA Citrus Fruits, Production and Utilization Series). In the first two weeks of April of that year, the quantity of shipments permitted from prorate district No. 1 was 277,200 cartons for the first week and 231,000 cartons for the second. (R 22-23; 81-82). Of these amounts defendants, LoBue Bros., were allotted, on their prorate base, 10,428 cartons and 8,702 cartons, respectively. After allowing for appropriate adjustments defendants' overshipments were 23,416 cartons for the first week and 8,848 cartons for the second week. The complaint is limited to the overshipments of the first week and those of the second week made prior to the date of filing the 15 A petition, April 9; such overshipments in the second week were 2,933 cartons. (R 22-24; 81-84). Permissible shipments for the same periods from prorate district No. 2, comprising Southern California, were 970,200 cartons for the first week and 693,000 cartons for the second week. (21 FR 2037; 2267).

The overshipments of 23,416 cartons for the first week and 2,933 cartons for the second week (prior to April 9) were made in 26 separate shipments, 23 of which were made on Saturday, April 7, and the remaining 3 in the early morning hours of Sunday, April 8. (R 33-34; 108-110).

EFFECTS OF NON-COMPLIANCE

For the crop year 1955-56, of which April, 1956, was a part, the average on tree price for California-Arizona navel oranges utilized in fresh shipments was $1.50 per carton; those utilized in processing, the principal outlet for oranges in excess of those which can be shipped fresh, returned only 3.5 cents per carton. (USDA, AMS, Agricultural Prices). Because of this very large difference in return on fresh shipments compared with processing, a shipper or grower who succeeded in obtaining a share of the fresh shipments available under the marketing order, larger than his fair share, gained a substantial advantage over his competitor or neighbor. To the extent that LoBue's overshipments on the week-end of April 7-8 permitted the shipment in fresh form of a greater quantity for the season than would have been possible had the requirements of the order been observed, LoBue Bros. and growers whose fruit was so shipped received well over $1.00 per carton more than they were entitled to receive.

Such a preference and advantage through non-compliance with the order is possible only because all other handlers and their growers continued to observe the requirements of the Order.

Had all handlers overshipped their allotments to the same extent that LoBue Bros. did in these two weeks, over 5 million cartons of California-Arizona navel oranges would have been shipped during these two weeks in April instead of the permissible maximum of 2,171,400 cartons. Under the impact of any such shipments, prices would have plunged to such distressingly low levels that there might have been no return above the transportation costs.

Of course no such fantastic violations of the Order by all shippers would ever occur. Even without regulation, shippers would not overload the market to such an extent.

However, since it is well established that any substantial volume in excess of current market demand causes an immediate reduction in price, it must follow that any overshipments, no matter how slight, tend in the direction of reducing the price for all. It is obvious from the sharp reduction in the quantity of permitted shipments in the second week compared with the first week (924,000 cartons from both districts compared with 1,247,400 in the first week) that there was a weakening of market price in this period. Otherwise, the prorate would not have been so sharply reduced.

This obvious inference is confirmed by the decline in the average weekly price for Central California navels received by Sunkist; for the week ending April 15, 1956, such price was 12 cents per carton less than that of the preceding week and 20 cents less than that of the succeeding week (R 337). In that week the total authorized shipments were 1,201,200 cartons (21 FR 2429, 2650). The price rise in the week succeeding April 15 was unquestionably due to the curtailment of the weekly prorate for the week of April 8-15. This illustrates the sensitivity of the market in responding to volume changes.

The overshipments included in the complaint occurred within a period beginning Saturday, April 7 and ending in the early morning hours of Sunday, April 8; 23 shipments were made on Saturday and 3 in the early morning hours of Sunday. The additional overshipments were completed in the next two days. Two cars were sold promptly; the others were all offered for sale through LoBue's brokers. (R 110-111). By reason of such offers for sale while "rolling" their impact upon the market was immediate. The total overshipments of 32,264 cartons may, therefore, appropriately be compared to a single week's prorate. They represent approximately 12% of the allowable shipments from district No. 1 for the first week

in April. They were 2.5% of the total allowable shipments of all California-Arizona navels for that week.

It would be difficult, if not impossible, to demonstrate mathematically what part LoBue's overshipments contributed to the price weakness which was present in the market in the second week of April as above noted. But if the decline in price amounted to only 10 cents per carton the loss or damage to all shippers on the total shipments of the first two weeks in April would amount to $217,140.00. Compared with such a loss to the navel shippers and growers as a whole, the amount for which recovery is sought for the non-compliance by LoBue Bros., namely, three times $49,870.74 (the value of the overshipments) is not unreasonable.

An even more serious result of unpunished non-compliance with a marketing order such as this one, is the threat of collapse of the order. As soon as it is learned that one handler who avoids the order can retain all the benefits of such non-compliance, other handlers will inevitably join in like non-compliance and the whole order will break down for lack of effective enforcement.

Such a result would have most serious consequences to the financial returns to growers. Here again it is difficult to measure mathematically the price effect of a Marketing Order. However, some measure of the possible financial consequences of abandonment of the existing navel orange order may be had by comparing price results in a year when there was no regulation with other years in which marketing order regulation prevailed.

Immediately preceding the present navel orange order which became effective September 22, 1953, there had been no marketing order regulation of California-Arizona navels since March 8, 1952, when the previous marketing order (which covered both navels and valencias) had been terminated. So in the 1952-53 season navel oranges were

without marketing order regulation. In 1952-53, with shipments equivalent to 30.3 million cartons, the average on tree price was 89 cents per carton. In the succeeding three years, under marketing order regulation, shipments and prices were respectively 24.7 million at $1.24 per carton, 26.5 million at $1.23 per carton and 27 million at $1.50. (USDA Citrus Fruits, Production and Utilization Series) The total on-tree returns for the smaller volume shipped under marketing order regulation all exceeded the return on the greater volume shipped without regulation, the comparisons in round numbers, being as follows:

1952-53	$27 million
1953-54	30.5 million
1954-55	32 million
1955-56	40 million

While other factors undoubtedly account for parts of these differences, it should be reasonably clear that the marketing order regulation adds substantial sums to the annual returns to navel growers and that discontinuance of the present navel marketing order would cause the growers to lose several million dollars annually. Compared with such a loss, the amount sought to be recovered in this case for a non-compliance which, if unpunished, might result in collapse of the order, is relatively small.

A further serious consequence of lack of effective enforcement with respect to the navel marketing order is the effect upon other marketing orders. Non-compliance is contagious and, if unchecked, tends to spread to other like orders. With respect to citrus fruits alone there are three other marketing orders presently in effect, one on valencia oranges, one on lemons and one on grapefruit (7 CFR, Parts 922, 953 and 955). If it is established that non-compliance with the navel orange order can be practiced with impunity, like non-compliance would surely spread to the valencia orange order and might well lead to like results with respect to the lemon and grapefruit

orders, as well as other marketing orders applicable to other commodities produced in the California-Arizona area. These collateral effects may easily become so serious as to adversely affect the whole agricultural economy of the West Coast area.

In the *Edwards* case dealing with an earlier orange marketing order and involving overshipments of a lesser quantity than those of LoBue Bros., this Court commented on the serious consequences of non-compliance as follows:

> "The effect of the appellant's violation of these provisions has been to impair the effectiveness of the program inaugurated by the act, as applied by the order, regulating the handling of oranges in interstate commerce and in foreign commerce to Canada, to disrupt and obstruct such commerce in such fruit, to render partially ineffective the lawful regulation of such commerce, as provided in the act and order, to bring about unstabilized marketing conditions respecting such commerce which have injured and burdened the orange industry, and to defeat the policy of Congress, declared in the act, to promote the orderly exchange of commodities among the several states of the United States and with foreign nations." *Edwards* v. *United States,* 91 Fed 2nd 767, 778.

In a case dealing with a milk marketing order under the same statute, the Supreme Court said:

> "Failure by handlers to meet their obligations promptly would threaten the whole scheme. Even temporary defaults by some handlers would work unfairness to others, encourage wider non-compliance, and engender those subtle forces of doubt and distrust, which so readily dislocate delicate economic arrangements." *United States* v. *Ruzicka,* 329 US 287, 293.

DEFENDANTS' NON-COMPLIANCE

There is not the slightest doubt that the defendants failed to comply with the order. The overshipments were intentional and deliberate, not to say premeditated. Many

references to the record might be made in support of the foregoing statement; we believe one is sufficient (R 99).

It is clear that the defendants knew the shipments were in excess of the quota and that an injunction would promptly be issued against further non-compliance. (R 108). But the scheme was to get the shipments made before the injunction could be served. The sole defense is that defendants believed they were immune from punishment by reason of a procedural maneuver which they were advised to make by counsel who had previously recommended such a maneuver to others with some success. (R 85-90). See also the three cases of *U. S.* v. *William S. Wright,* No. 3036-H-Civil; *U. S.* v. *Alexander Chaskin,* No. 3065 O.C.-Civil; and *U. S.* v. *A. Levy and J. Zentner Co.,* No. 3081-H-Civil, cited in the memorandum decision by the District Court. (R 65-67).

The forfeiture claimed against defendants is not a criminal penalty. There is no requirement that wrongful intent be shown as when a defendant is accused of a crime. As was said by the Supreme Court in a case involving forfeiture under the Internal Revenue Laws:

> "Forfeiture of goods or their value and the payment of fixed or variable sums of money are other sanctions which have been recognized as enforceable by civil proceeding since the original Revenue Law of 1789. * * * In spite of their comparative severity such sanctions have been upheld against the contention that they are essentially criminal and subject to the procedural rules governing criminal prosecutions." (Citing cases). *Helvering* v. *Mitchell,* 303 US 391, 400.

It seems unnecessary to burden the Court with any further repetition of the argument and supporting authorities set forth in the brief for the United States. We submit that the conclusion should be that the defendants "willfully" exceeded their allotments under the navel

marketing order and the statutory forfeiture should be recovered by the United States.

The decision in this case will be a signal to other handlers of navel oranges and to handlers under other similar marketing orders either that compliance with such orders can be effectively enforced or that a method is readily available by which limitations on shipments may be ignored without risk of monetary loss.

CONCLUSION

The judgment of the District Court should be reversed and the case remanded with directions to enter judgment for the United States in accordance with the prayer of the complaint.

Respectfully submitted,

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